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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

THEO WHITE, Warden,
Petitioner,

v.

MICHAEL EDWARD VANSICKEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL EDWARD VANSICKEL, Petitioner-Appellant,	)	No. 97-17143
v.	)	D.C. No. CV-95-01355-WBS
THEO WHITE, Warden, Respondent-Appellee.	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
July 17, 1998--San Francisco, California

Filed January 27, 1999

Before: Stephen Reinhardt, John T. Noonan and
David R. Thompson, Circuit Judges

Opinion by Judge Thompson;
Dissent by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court. The court held that on federal habeas

corpus, a criminal trial attorney's failure to make a timely objection to an erroneous denial of peremptory challenges creates a procedural default requiring the petitioner to show actual resulting prejudice.

Under Cal. Code Civ. P. § 231, a criminal defendant on trial for an offense that carries a penalty of death or life imprisonment is entitled to 20 peremptory challenges. In appellant Michael Vansickel's California capital murder trial, the court limited his peremptory challenges to ten. Defense counsel did not object. During jury selection, Vansickel exercised ten peremptories. Both sides agreed with the court's observation that a jury had been selected. The jury convicted Vansickel as charged.

Based on the court's announcement that it had erred in limiting defense peremptory challenges, Vansickel moved for a new trial. He presented evidence that he had been dissatisfied with the composition of the jury, and asserted that he would have used the additional peremptories.

The trial court denied the motion on the ground that defense counsel had failed to make a contemporaneous objection to the denial of peremptory challenges, and had failed to establish resulting prejudice.

The California Court of Appeal affirmed, and the California Supreme Court denied review.

On federal habeas corpus, the district court determined that the trial court's denial of the statutorily mandated peremptory challenges violated Vansickel's due process rights. However, the court concluded that the claim was procedurally defaulted by defense counsel's failure to object to the irregular procedure at trial. The court went on to rule that Vansickel was required, but

failed to establish cause and resulting prejudice. Vansickel appealed.

[1] Peremptory challenges are not of constitutional dimension. The "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides.

[2] California Code of Civil Procedure creates a statutoryright to 20 peremptory challenges when a defendant faces a sentence of death or life imprisonment. Vansickel was entitled to 20 peremptory challenges and he received only 10. This state right to peremptory challenges is a state-created liberty interest protected by the Fourteenth Amendment.

[3] Vansickel's federal constitutional rights were violated. [4] However, Vansickel failed to timely object to the denial of his statutory allotment of peremptories in state court. By failing to object, he procedurally defaulted on the federal constitutional claim he raised in this habeas proceeding.

[5] Federal habeas review of a claim is barred in all cases where a state prisoner has defaulted his federal claim in state court pursuant to an adequate and independent state procedural rule. To preclude federal review, a state court must have relied on a procedural bar as the basis for its disposition of the case.

[6] The California Court of Appeal found that defense counsel failed to contemporaneously object, and as a result Vansickel had to establish prejudice. The court cited to California law that an error in limiting peremptory challenges, if timely and properly raised, is reversible per se. However, when a defendant fails to timely object, his conviction will not be reversed unless he demonstrates

prejudice. The Court of Appeal applied the prejudice standard of miscarriage of justice under California law, and determined that Vansickel could not establish prejudice. [7] Because the California court found Vansickel's claim procedurally barred under state law, he had to demonstrate cause and prejudice to obtain habeas relief under federal law.

[8] If a claim is procedurally barred by an adequate and independent state ground, in appropriate circumstances a federal court may still review the merits of the defaulted claim. However, federal habeas review is barred unless the habeas prisoner can demonstrate cause for the denial and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

[9] The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. Ineffective assistance of counsel is cause for procedural default, but attorney error short of ineffective assistance does not constitute cause. [10] Attorney inadvertence or ignorance of the law does not establish cause for a procedural default.

[11] In this case, it appeared that defense counsel's ignorance of the law probably would not have constituted cause to excuse the procedural default. But even if it would have, Vansickel could not establish prejudice because there was no reasonable probability that but for counsel's error, the result of the trial would have been different.

[12] Vansickel did not demonstrate that if he had been allowed to use additional peremptories, the outcome of his case would have been different. The evidence against Vansickel was overwhelming. [13] Vansickel failed to demonstrate that the denial of peremptory challenges had a substantial and injurious effect or influence in determining the jury's verdict.

[14] Vansickel's case was not a direct federal appeal where the court of appeals reviews the error after a contemporaneous objection has been made. Vansickel was before the court of appeals on habeas review of his state-court conviction after he failed to make a timely objection to the error in state court. The analysis for this procedural default was cause and prejudice. Vansickel failed to establish prejudice.

Judge Reinhardt dissented, writing that because it is virtually impossible to determine whether a denial of peremptory challenges was harmless, the error in Vansickel's case was reversible per se.

COUNSEL

Connie Marie Alvarez, Federal Public Defender, Sacramento, California, for the petitioner-appellant.

Patrick J. Whalen, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

THOMPSON, Circuit Judge:

Michael Edward Vansickel appeals the judgment of the district court denying his habeas petition under 28 U.S.C. § 2254. Vansickel was tried and convicted of first degree murder with the special circumstance of lying in wait. During jury selection, he was erroneously denied half of his peremptory challenges, but he failed to contemporaneously object.

This case presents the question whether the erroneous denial of peremptory challenges provided for by state statute violates a defendant's due process rights under the United States Constitution. It also presents the question whether, if a federal constitutional violation occurs in this circumstance, automatic reversal of the defendant's state court conviction is required, or whether, when the defendant has procedurally defaulted on his federal constitutional claim in state court, he must establish cause and prejudice for the default.

We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm the district court's denial of the writ. We hold that Vansickel's constitutional rights were violated because he did not receive the full complement of peremptory challenges he was entitled to under California law. However, Vansickel procedurally defaulted his claim in state court and this bars federal habeas review unless he can demonstrate both cause and prejudice, which he cannot.

I

BACKGROUND

Vansickel and Mark Howard, the victim, were in a car that crashed into a drainage ditch in Corning, California. When the police arrived they found Howard in the car; he had been shot in the head at close range by a .22 caliber revolver.

A resident saw Vansickel running across a nearby lawn and heard him say that his friend had been shot, he did not do it, and not to call the police. When the police arrived, they found Vansickel lying in a driveway. As they approached, Vansickel told them that he had the murder weapon. He then displayed a gun, a Ruger .22-caliber revolver, wrapped in a blood-soaked shirt. The officers took cover and ordered Vansickel to drop the gun. Vansickel fired a shot and then dropped the gun and surrendered. He had broken his hip during the car accident and was taken to a hospital.

When Vansickel was questioned at the hospital, he claimed that a third person, Dan, had been in the car and had shot Howard. However, Vansickel later told his former girlfriend that he had "put two rounds into Mark [Howard]" and he had made up the story about Dan. Vansickel further discredited his claims of innocence by sending letters from jail that were admitted into evidence at trial. In one of the letters, Vansickel stated: "I think I fucked up by telling them that there was one more person in the car and that he shot Mark. I gave them a fony [sic] description an [sic] what he was wearing." Later in the same letter, he wrote, "I had to say something to the cops so I made up this Dan . . . ." At trial Vansickel conceded he had shot Howard.

Following his conviction, Vansickel filed a motion for a new trial because during jury selection he was denied half of his peremptory challenges. Under California Code of Civil Procedure § 231, a criminal defendant who is on trial for an offense where the penalty is death or life imprisonment is entitled to twenty peremptory challenges.[1] Vansickel was only allowed ten peremptories.

The state court judge had discussed jury selection with counsel at a pretrial conference. Recollections of what transpired at the conference conflict, however it is clear that both the court and defense counsel agreed that the defense was entitled to ten peremptories. The judge recalled that defense counsel stated it was his understanding he was entitled to ten peremptories and the court agreed. Defense counsel recalled that he asked the court how many peremptories he was entitled to, and the court said ten. The prosecuting attorney remained silent.

During jury selection, Vansickel exercised the ten peremptory challenges. After Vansickel's tenth challenge, the court stated, "I think we have a jury, Counsel." Both the prosecutor and the defense agreed.

After the verdict, but prior to sentencing, the court realized it had erroneously denied Vansickel his full allotment of peremptory challenges. The court immediately contacted the prosecutor and defense counsel and revealed the error.

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1. Section 231(a) reads: "In criminal cases, if the offense charged is punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 20 and the people 20 peremptory challenges." Cal. Civ. Proc. Code § 231(a) (West 1997).

Vansickel then moved for a new trial and presented evidence that he had been dissatisfied with the composition of the jury. Vansickel argued he would have used the additional peremptory challenges. In support of this argument, defense counsel presented a jury chart which had an asterisk next to juror number two, Mr. Frank. Defense counsel argued that he would have challenged Mr. Frank, who was a pharmacist, because Vansickel tested positive for illegal drug use after the murder, and defense counsel did not want a pharmacist on the jury. Further, defense counsel argued he would have used two more peremptory challenges to try to put on the jury two other potential jurors from the jury pool who he felt would be more sympathetic to the defense.

The trial court denied the motion for a new trial. The court reasoned that because defense counsel failed to make a contemporaneous objection to the loss of peremptory challenges, the court could only grant the motion if Vansickel demonstrated prejudice. The court found no prejudice. The court stated it could see no logic in defense counsel's argument that because juror number two, Mr. Frank, was a pharmacist he would have a strong feeling about someone with drugs in their system. Further, Vansickel's use of illegal drugs was not a major part of the case. The court dismissed as "the merest speculation" defense counsel's argument that he would have used peremptories to try to put two other persons on the jury. The court stated that if these two potential jurors had been drawn and on voir dire they turned out to be as favorable to the defense as defense counsel claimed, the prosecution most likely would have used its peremptories to strike them.

The California Court of Appeal affirmed the trial court. It determined that Vansickel's failure to timely object required that he demonstrate prejudice. The

standard for prejudice under California law is miscarriage of justice. The Court of Appeal held that Vansickel could not demonstrate prejudice for essentially the same reasons relied on by the trial court. It concluded that Mr. Franks's occupation as a pharmacist was not prejudicial because drugs were not a significant part of the case and Vansickel did not present any evidence that drugs affected his mental state at the time of the murder. Further, it was mere speculation that the two prospective jurors Vansickel wanted to put on the jury would ever have been sworn. Finally, the appellate court concluded that the overwhelming evidence against Vansickel supported the conclusion that no miscarriage of justice occurred. The California Supreme Court denied review. Vansickel then filed state habeas petitions in the California Court of Appeal and in the California Supreme Court. Both courts denied the petitions. He then filed his federal habeas petition in the district court.

The district court determined that the trial court's improper denial of peremptory challenges violated Vansickel's due process rights. However, the court concluded that the claim was procedurally barred because Vansickel failed to make a timely objection in state court. Therefore Vansickel had to demonstrate cause and prejudice. The district court concluded that defense counsel's failure to object to a limit of ten peremptories did not establish cause, and that Vansickel could not establish prejudice because there was no basis to infer that the result of Vansickel's trial would have been different had he been given his full complement of peremptory challenges.[2/]

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2. The district court relied upon a report and recommendation from the magistrate judge. The court agreed with the magistrate judge's determination that there was a due process violation and procedural default, but disagreed with the magistrate judge's

A. *Due Process Violation*

The first issue we address is whether denial of peremptory challenges provided for by a state statute violates a state criminal defendant's federal constitutional rights.

[1] The Supreme Court has stated that "peremptory challenges are not of constitutional dimension." *Ross v. Oklahoma*, 487 U.S. 81, 88, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988). In Ross, the Court held that the erroneous denial of a challenge for cause that required defense counsel to use a peremptory challenge did not violate the Sixth Amendment. The Court concluded that peremptory challenges are a creature of statute, not required by the Constitution, and "as such, the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." *Id.* at 89.

In *United States v. Martinez-Salazar*, 146 F.3d 653 (9th Cir. 1998), we held that Ross did not foreclose a Fifth Amendment challenge to a wrongful denial of a peremptory challenge. *Id.* at 657-58. There, we concluded that the erroneous denial of peremptory challenges provided for by federal law violated a defendant's Fifth Amendment right to due process in a federal prosecution. *Id.* at 658. We distinguished our holding from earlier decisions of this court that concluded the impairment of a defendant's use of peremptory challenges did not constitute a due process violation. See *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994); *United States v. Baker*, 10 F.3d 1374 (9th Cir. 1993). These cases are instructive.

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conclusion that there was cause and prejudice to overcome the procedural bar.

In *Baker*, the defendants alleged their Fifth Amendment due process rights were violated by the district court's refusal to ask supplemental voir dire questions to probe prospective jurors for bias. *Baker*, 10 F.3d at 1403-04. The defense used peremptory challenges to excuse three jurors that it argued should have been excused for cause. However, the defendants' due process rights were not violated because they were provided more than the required allotment of peremptory challenges and they did not exhaust them. *Id.* at 1404.

In Siripongs, the petitioner argued that the trial court applied the wrong standard during voir dire to determine "death prone" jurors. *Siripongs*, 35 F.3d at 1322. We stated that it was "immaterial" that petitioner had to use peremptory challenges to excuse jurors that the trial court should have excused for cause because the petitioner did not exhaust all of his peremptory challenges. *Id.* at 1322. We also stated: "Moreover, the loss of peremptory challenges is not a due process violation." *Id.*

In *Martinez-Salazar*, we distinguished *Siripongs* stating: "Siripongs cannot stand for the proposition that the loss of a peremptory challenge never violates due process because Ross and Baker make clear that some such losses do indeed violate due process." *Martinez-Salazar*, 146 F.3d at 658. The petitioner in *Siripongs* "could suffer no due process violation because he did not exhaust all of his peremptory challenges and hence his right was not 'denied or impaired' in any way." *Id.* Further, Siripongs alleged a Sixth Amendment violation, not a violation of his due process rights under the Fifth Amendment. *Id.*

We concluded in Martinez-Salazar that the erroneous denial of peremptory challenges can constitute a due process violation under the Fifth Amendment. Because the due process requirement of the Fifth Amendment is

incorporated into the Fourteenth Amendment, the first question we confront in this state habeas case is whether the erroneous denial of peremptory challenges provided for by California law violated Vansickel's due process rights under the Fourteenth Amendment.

[2] California Code of Civil Procedure § 231 creates a statutory right to twenty peremptory challenges when a defendant faces a sentence of death or life imprisonment. Vansickel was entitled to twenty peremptory challenges and he only received ten. This state right to peremptory challenges is a state-created liberty interest protected by the Fourteenth Amendment to the Constitution. "The failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993); *see also Moran v. Godinez*, 57 F.3d 690, 698 (9th Cir. 1994) ("the denial or misapplication of state procedures that results in the deprivation of a substantive right will implicate a federally recognized liberty interest.").

[3] Applying these principles, we conclude that Vansickel's federal constitutional rights were violated. *See Martinez-Salazar*, 146 F.3d at 658 ("Due process would be violated if a trial court permitted a defendant to exercise fewer than the number of peremptory challenges authorized by law."); *Hines v. Enomoto*, 658 F.2d 667 (9th Cir. 1981) (holding denial of half of the peremptory challenges authorized by statute violates a defendant's due process rights).[3]

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3. *Hines* was decided prior to the Supreme Court's decision in *Ross v. Oklahoma*, 487 U.S. 81, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988) which held that the Sixth Amendment does not provide any constitutional right to peremptory challenges. In *Hines*, the court

[4] Vansickel, however, failed to timely object to the denial of his statutory allotment of peremptories in state court. By failing to object, he procedurally defaulted on the federal constitutional claim he raises in this habeas proceeding.

B. *Procedural Default*

[5] Federal habeas review of a claim is barred in all cases where a state prisoner has defaulted his federal claim in state court pursuant to an adequate and independent state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1983). In order to preclude federal review, a state court must have relied on a procedural bar as the basis for its disposition of the case. *Harris v. Reed*, 489 U.S. 255, 261-62, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989). "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Id.* at 263.

[6] To determine whether Vansickel's claim was procedurally barred, we look to the California Court of Appeal's opinion because it is the last reasoned state court opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991). The California Court of Appeal found that defense counsel failed to contemporaneously object, and as a result Vansickel had to establish prejudice. The court cited to California law that an error in limiting peremptory challenges, if timely and properly raised, is reversible per se. *See People v.*

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assumed that the defendant's due process rights would be violated because denial of peremptory challenges would violate the Sixth Amendment.

Yates, 34 Cal. 3d 644, 654, 669 P.2d 1, 194 Cal. Rptr. 765 (1983). However, where a defendant fails to timely object, his conviction will not be reversed unless he demonstrates prejudice. *See People v. Caro*, 46 Cal. 3d 1035, 1046-47, 761 P.2d 680, 251 Cal. Rptr. 757 (1988). The California Court of Appeal applied the prejudice standard of miscarriage of justice under California law, and determined that Vansickel could not establish prejudice.

[7] Because the California court found Vansickel's claim procedurally barred under state law, to obtain habeas relief under federal law he must demonstrate cause and prejudice.

C. *Cause and Prejudice*

[8] If a claim is procedurally barred by an adequate and independent state ground, as it is in the present case, in appropriate circumstances a federal court may still review the merits of the defaulted claim. "The doctrine of procedural default is based on comity, not jurisdiction, and the federal courts retain the power to consider the merits of procedurally defaulted claims." *Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992). Federal habeas review is barred, however, unless the habeas prisoner can demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

1. *Cause*

[9] The existence of cause for a procedural default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's

procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986). Ineffective assistance of counsel is cause for procedural default, but "attorney error short of ineffective assistance of counsel does not constitute cause." *Id.* at 492.

We are presented with a rather unusual instance of claimed ineffective assistance because both the prosecutor and the court shared in defense counsel's error. Nevertheless, Vansickel argues that his counsel's ignorance of the law and resulting failure to object to the loss of half of his allotted peremptory challenges constitutes ineffective assistance.

[**10**] Attorney inadvertence or ignorance of the law does not establish cause for a procedural default. *Murray*, 477 U.S. at 486-87; *Correll v. Stewart*, 137 F.3d 1404, 1416 (9th Cir. 1998) ("The mere ignorance or inadvertence of [defense] counsel does not furnish sufficient cause to excuse procedural default."); *but cf. Garrison v. McCarthy*, 653 F.2d 374, 378 (9th Cir. 1981) (stating that "in cases of attorney inadvertence or ignorance, a lesser showing of incompetency of counsel should be sufficient for 'cause.'").

[**11**] In the present case, it appears defense counsel's ignorance of the law probably would not constitute cause to excuse the procedural default. But even if it would, we hold that Vansickel cannot establish prejudice because there is no reasonable probability that but for counsel's error, the result of the trial would have been different. *See White v. Lewis*, 874 F.2d 599, 604 (9th Cir. 1989).

2. *Prejudice*

Vansickel asks us to apply the prejudice standard set forth in *Hines v. Enomoto*, 658 F.2d 667 (9th Cir. 1981). Hines was denied half of his allotted peremptory

challenges because his attorney failed to recognize that Hines was entitled to twenty-six peremptories rather than the normal thirteen. *Id.* at 671. On habeas review, Hines's claim was procedurally barred because his counsel failed to object in state court. *Id.* at 673. We applied a cause and prejudice analysis to Hines's claim. We held that in order to establish prejudice, he had to "demonstrate that his state trial counsel would have challenged another juror or jurors had he been aware of the remaining challenges." *Id.* at 674.

If we were to measure prejudice under the *Hines* standard, Vansickel would indeed be able to demonstrate prejudice. Defense counsel had placed an asterisk next to Juror Franks's name and the trial court was persuaded that he would have challenged Franks if he had been aware of the remaining challenges. However, *Hines* was decided in 1981 prior to the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Strickland held that to establish prejudice, a habeas petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. We also consider whether "the result of the proceedings was fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 368, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993).

[12] Vansickel has not demonstrated that if he had been allowed to use additional peremptories to strike Juror Franks or to attempt to put two other persons from the jury pool on the jury, the outcome of his case would have been different. The evidence against Vansickel was

overwhelming. He was found at the murder scene with the murder weapon in his hand. He admitted to his former girlfriend that he had shot Howard. In the letters he wrote in jail, he stated that he fabricated the story about Dan. Further, at trial he conceded that he had, in fact, shot Howard.[4] There is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694.

[13] In sum, Vansickel failed to demonstrate that the denial of peremptory challenges "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

D. *Automatic Reversal*

We distinguish this case from our recent opinions holding that erroneous denial of a peremptory challenge requires automatic reversal. *See Martinez-Salazar*, 146 F.3d 653; *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996). Both *Martinez-Salazar* and *Annigoni* are direct federal appeal cases in which the defendants timely objected in the district court to the erroneous limitation of their peremptory challenges.

In *Annigoni*, the district court erroneously refused to allow Annigoni to use one of his peremptory challenges to strike a potential juror. *Annigoni*, 96 F.3d at 1136. We

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4. This analysis is similar to the prejudice analysis applied by the California Appellate Court. The appellate court applied the "miscarriage of justice" standard and concluded that it was not reasonably probable that Vansickel would have received a more favorable result if there had been no error. In light of the entire record and the overwhelming evidence against Vansickel, the error did not result in a miscarriage of justice.

held that the erroneous denial of a criminal defendant's right of peremptory challenge in a federal trial requires automatic reversal. *Id.* at 1134.

In *Martinez-Salazar*, the defendant was forced to use one of his peremptory challenges to strike a juror after the court erroneously refused to strike the juror for cause. 146 F.3d at 655. In accordance with *Annigoni*, we held that the error required automatic reversal. *Id.* at 659. *See also United States v. Turner*, 558 F.2d 535, 538 (9th Cir. 1977) (holding that the denial of peremptory challenges requires automatic reversal without a showing of prejudice).

[**14**] Unlike *Annigoni*, *Martinez-Salazar*, and *Turner*, Vansickel's case is not a direct federal appeal where we review the error after a contemporaneous objection has been made. Vansickel is before us on habeas review of his state court conviction after he failed to make a timely objection to the error in state court. The applicable analysis for this state court procedural default is cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 85-87, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). Applying this analysis, we conclude Vansickel failed to establish prejudice.

II

CONCLUSION

Although we hold that Vansickel's federal due process rights were violated by the erroneous denial of half of the peremptory challenges to which he was entitled under California law, his failure to timely object precludes our consideration of whether automatic reversal would apply to his conviction. Because Vansickel procedurally defaulted his federal constitutional claim in state court, he

is required to establish cause and prejudice to excuse his state court default. He has not done so.

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

The majority acknowledges that the trial court's erroneous denial of half of Vansickel's statutorily authorized peremptory challenges - ten out of twenty - violated his right to due process. The majority further acknowledges that our cases hold that, because it is impossible to determine whether an error that affects the composition of a jury had an actual effect on a jury's verdict, the erroneous denial of even one peremptory challenge requires a presumption of prejudice and automatic reversal of a criminal conviction. Finally, the majority appears to agree that the rule requiring the presumption of prejudice applies in habeas cases as well as on direct appeal. However, the majority then holds that because Vansickel's counsel failed to object during the empanelment of the jury, Vansickel procedurally defaulted his claim and therefore must, unlike the ordinary habeas petitioner, demonstrate actual prejudice as to the outcome of his case. Without explaining how Vansickel or any other litigant could possibly make such a showing, the majority simply overrides our well established rule that prejudice as to the result need not, indeed cannot, be shown in jury composition cases. By doing so, it renders it virtually impossible for any defendant to vindicate his right to due process if his attorney has committed a procedural default in such a case. In rejecting our common sense rule, the majority commits a serious error. Its imposition of an

insurmountable barrier to the vindication of a right to due process is incompatible with the Constitution. *See Penson v. Ohio*, 488 U.S. 75, 86, 102 L. Ed. 2d 300, 109 S. Ct. 346 (1988) (prejudice must be presumed because otherwise right to appellate counsel would be eviscerated); *Michel v. Louisiana*, 350 U.S. 91, 94-95, 100 L. Ed. 83, 76 S. Ct. 158 (1956) (court will not apply procedural bar rule that "raises an insuperable barrier" to vindication of a constitutional right).

Because the majority glosses over the reasons courts have adopted the automatic reversal rule in jury composition cases, I briefly outline them here. This circuit has held that the remedy for improper denial of peremptory challenges is automatic reversal, because "it would be virtually impossible to determine whether the denial of a peremptory challenge was harmless." *United States v. Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc).[1] *Annigoni* reasoned that because the very purpose of peremptory challenges is to allow dismissal of potential jurors for subjective, unidentifiable reasons, and because the effect of a change in jury composition on jury

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1. Our court's application of a rule of automatic reversal is in accord with the conclusion of other circuits to consider this question. *See United States v. Underwood*, 122 F.3d 389, 392 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998) (automatic reversal appropriate when due process violated by impairment of intelligent exercise of peremptory challenges); *United States v. Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996), *cert. denied*, 519 U.S. 1093, 117 S. Ct. 771, 136 L. Ed. 2d 717, 117 S. Ct. 772 (1997) (impairment of right to exercise peremptory challenges requires reversal); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 162 (3d Cir. 1995) (automatic reversal proper remedy in civil case); *Knox v. Collins*, 928 F.2d 657, 661 (5th Cir. 1991) (impairment of right to exercise peremptory challenges requires automatic reversal of state conviction); *United States v. Cambara*, 902 F.2d 144, 147-48 (1st Cir. 1990) (denial of peremptory challenge to which statute entitles requires reversal).

deliberations cannot be determined, evaluation of the effect of this type of error is impractical and impossible. *Id.* at 1144-45. Therefore, impairment of the right to exercise statutorily authorized peremptory challenges requires no case-specific demonstration of actual prejudice. *Id.* at 1144-45, 1147. In *Martinez-Salazar*, we took this analysis one step further, holding that the improper denial of even one peremptory challenge violates due process and requires automatic reversal, whether or not an objectionable juror actually served on the jury. *See United States v. Martinez-Salazar*, 146 F.3d 653, 658-59 (9th Cir. 1998).

Instead of being required to demonstrate an effect on his verdict, Vansickel should, under our precedent, be required to establish only "that his state counsel would have challenged another juror or jurors had he been aware of the remaining challenges." *Hines v. Enomoto*, 658 F.2d 667, 674 (9th Cir. 1981). This showing would establish that his right was *actually impaired* by demonstrating that he would have used additional peremptory challenges if provided the opportunity.[2] In this case, as the majority acknowledges, Vansickel's lawyer met that standard; he demonstrated to the trial court's satisfaction that he would have used additional peremptories had they been provided.

Here, although Vansickel did not receive the jury he was entitled to and was thereby deprived of his right to a fair trial, the majority nonetheless holds that in view of his counsel's procedural default our rules do not apply and that in order to establish prejudice Vansickel must prove that his counsel's error actually affected the outcome of

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2. A defendant may make such a showing by demonstrating that he used all of the peremptory challenges that were provided to him. *See Martinez-Salazar*, 146 F.3d at 658-59.

the proceeding.[3/] However, application of such an actual

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3. Vansickel makes a strong argument that the state's rule should not be treated as a procedural bar. California case law entitles a defendant who has objected to an improper denial of a jury challenge to automatic reversal, but otherwise requires a demonstration of prejudice. *See People v. Caro*, 46 Cal. 3d 1035, 761 P.2d 680, 686-87, 251 Cal. Rptr. 757 (Cal. 1988). Although the district court characterized this "prejudice" requirement as a procedural bar, the rule actually operates to reverse the presumption of prejudice, not to waive review of the merits of the claim. In fact, the California courts have not termed this additional prejudice requirement a "procedural bar" or a "procedural default" rule. It appears that a defendant who fails to make a contemporaneous objection may still raise the statutory or constitutional claim, and the California courts will still consider the merits, as long as the defendant can demonstrate that he wanted to use additional challenges and was dissatisfied with the jury composition - in other words, that the error had some prejudicial effect on the rights of the defendant. *See Caro*, 46 Cal. 3d at 1047 (defendant cannot show prejudice when he made no objection and gave no indication of dissatisfaction with the jury); *People v. Crowe*, 8 Cal. 3d 815, 506 P.2d 193, 204-05, 106 Cal. Rptr. 369 (Cal. 1973) (no prejudice when defense attorney indicated satisfaction with jury). However, in Vansickel's case, the California court applied a different prejudice standard, one that required that the petitioner demonstrate that the denial of peremptory challenges affected the outcome of his trial. *Cf. People v. Johnson*, 6 Cal. 4th 1, 859 P.2d 673, 682 (Cal. 1993) (barring any claim based on improper denial of peremptory challenge when defendant failed to object); *Buckley v. Chadwick*, 45 Cal. 2d 183, 288 P.2d 12, 23 (Cal. 1955) (applying miscarriage of justice standard when plaintiff improperly denied peremptory challenge). Unless a procedural bar rule is "strictly or regularly followed" by the state courts, a federal court should not apply it to foreclose review of a petitioner's claim. *Hathorn v. Lovorn*, 457 U.S. 255, 263, 72 L. Ed. 2d 824, 102 S. Ct. 2421 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149, 12 L. Ed. 2d 766, 84 S. Ct. 1734 (1964)). Moreover, in this case, the state court considered the merits of Vansickel's claim, finding that his right to peremptory challenges was violated but that he could not demonstrate an effect on the jury's verdict. State court consideration of the merits of a defendant's claim means that there has been no procedural bar applied. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801, 115 L. Ed. 2d 706, 111 S. Ct. 2590

prejudice standard constitutes an impossibility for defendants. Moreover, it is not permissible to require application of that standard when the error is one that we have clearly stated is not susceptible of actual prejudice analysis. Because we have held that there is no way to ascertain the impact on the result of a trial, denial of due process must be presumed prejudicial. *See Riggins v. Nevada*, 504 U.S. 127, 137, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992) (presuming prejudice when "efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different . . . would be purely speculative").

The majority reaches its untenable position by arguing that the procedural default at issue here involves *Strickland* error and that *Strickland* precludes the use of the presumed prejudice rule. The majority is wrong. It misconceives the nature of the *Strickland* error rule. Contrary to the majority's assumption, the prejudice inquiry as articulated in *Strickland* is not limited solely to ascertaining the error's effect on the result of a trial - rather, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. Requiring a showing of prejudice that we know to be impossible

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(1991) (if the last state court reaches the merits of a federal claim, there is no procedural bar). In this case, the state court considered Vansickel's claim and rejected it on the merits, concluding that he could not demonstrate prejudice. This weighs heavily against a finding of procedural default. See *McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995) (state court consideration of merits in applying rule allowing consideration of certain constitutional issues negates "independence" of state rule); *Breechen v. Reynolds*, 41 F.3d 1343, 1354 (10th Cir. 1994) (review of claim for fundamental error renders state rule not independent).

certainly cannot help the courts evaluate whether a trial was fundamentally unfair.

In fact, *Strickland* itself acknowledges that "in certain Sixth Amendment contexts, prejudice is presumed." *Strickland*, 466 U.S. at 692. When the performance of counsel has been so egregious as to amount to a constructive denial of counsel, we presume prejudice. *See United States v. Cronic*, 466 U.S. 648, 659-60 & n.25, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984) (when counsel "fails to subject prosecution's case to meaningful adversarial testing," or counsel has been absent at critical stage, prejudice is presumed); *Lozada v. Deeds*, 498 U.S. 430, 432, 112 L. Ed. 2d 956, 111 S. Ct. 860 (1991) (presuming prejudice when counsel failed to file notice of appeal); *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (presuming prejudice when counsel conceded that there was no reasonable doubt as to elements of crime). Similarly, when counsel is burdened by an actual conflict of interest, a defendant need only demonstrate that this conflict had an adverse effect on counsel's performance, not on the outcome of the trial, since "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. 668 at 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980) ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."). Finally, when employing *Strickland's* prejudice standard would effectively eviscerate the right, the Court presumes prejudice. *See Penson*, 488 U.S. at 86 (presuming prejudice when defendant was not represented on appeal because "finding harmless error or a lack of *Strickland* prejudice in cases such as this . . . would leave indigent criminal appellants without any of the protections afforded by *Anders*.").

When it is not possible or practical to analyze prejudice on a case-by-case basis and a presumption of prejudice is required in order to protect an important substantive right, the *Strickland* prejudice inquiry necessitates application of the presumed prejudice rule. The Eighth Circuit recently held that when a counsel's performance has led to an error that is "not amenable to harmless error analysis, but requires automatic reversal," prejudice must also be presumed for purposes of the *Strickland* analysis. *See McGurk v. Stenberg*, 1998 U.S. App. LEXIS 30985, No. 97-4253, 1998 WL 850128 at *3-4 (8th Cir. Dec. 10, 1998). Other courts have reached similar conclusions when counsel's error has affected the jury trial mechanism. *See, e.g., Government of Virgin Islands v. Weatherwax*, 20 F.3d 572, 579-80 (3d Cir. 1994) ("Prejudice should not be presumed; but when juror misconduct is coupled with the trial court's failure to hold a voir dire to determine the outcome of the misconduct on the jury function, proof of actual prejudice is excused and a new trial is warranted."); *Hollis v. Davis*, 941 F.2d 1471, 1483 (11th Cir. 1991) (presumption of *Strickland* prejudice is warranted when attorney's error resulted in all-white jury, race was at issue in case, and trial transcript was not available for review); *Smith v. Gearinger*, 888 F.2d 1334, 1338-39 (11th Cir. 1989) (presuming partiality of juror in accord with state law for purposes of *Strickland* inquiry).[4]

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4. However, courts are not in agreement on this issue. In a case decided almost simultaneously with its decision in *McGurk*, indeed only six days earlier, the Eighth Circuit reached a contrary result. In *Young v. Bowersox*, 161 F.3d 1159, 1998 WL 834365 (8th Cir. 1998), the court held that a defendant whose lawyer failed to object to racially discriminatory peremptory challenges was required to demonstrate a reasonable probability that the result of his trial would have been different if counsel had raised the objection. *Id.* at *2. Neither the *Young* court nor the opinion on which it relied, *Wright v. Nix*, 928 F.2d 270, 273 (8th Cir. 1991) (in dicta, stating that defendant

The impracticability of attempting to analyze the effect of jury composition error while excluding the rule of presumed prejudice is well-illustrated by the majority's approach in this case. The majority does not argue that the presence of the particular jurors that Vansickel would have dismissed had no effect on the jury's deliberations - because, of course, there is no way for the majority to *know* what role these jurors played. Instead, the majority solely emphasizes the "overwhelming" nature of the evidence of Vansickel's guilt. However, as the Supreme Court has made clear, analysis of the effect of an error on a particular trial cannot properly focus exclusively on the strength of the evidence against the defendant:

> [T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. . . . The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

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must demonstrate actual effect on result when counsel failed to object to discriminatory use of peremptory challenges), addressed or even acknowledged the practical question posed by its holding: how could a petitioner possibly make such a showing in a case involving jury composition error? The Eleventh Circuit has also required a defendant to demonstrate a reasonable probability that the result of the proceeding would have been different if counsel had been competent, even in cases in which counsel's error affected the composition of the jury itself. *Jackson v. Herring*, 42 F.3d 1350, 1360-62 (11th Cir. 1995) (attorney failed to raise Swain objection). It, too, failed to consider the critical question of how a defendant can make a showing of prejudice in such a case.

Kotteakos v. United States, 328 U.S. 750, 764-65, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946) (citations omitted). *See also Sullivan v. Louisiana*, 508 U.S. 275, 279, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) ("The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee."); *Brecht v. Abrahamson*, 507 U.S. 619, 642-43, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (Stevens, J., concurring) ("The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place. *Kotteakos* is full of warnings to avoid that result."). The majority's disposition of Vansickel's claim rests exclusively on its assessment of the verdict that a constitutionally composed jury would have reached, in direct conflict with the Supreme Court's admonitions to avoid such a hypothetical exercise.

The majority also suggests, without so holding, that Vansickel probably could not demonstrate cause for his default because his lawyer was not constitutionally ineffective. This is clearly wrong: defense counsel missed the most elementary statutory protection provided to defendants. He unknowingly forfeited half of Vansickel's guaranteed allotment of peremptory challenges, "one of the most important of the rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408, 38 L. Ed. 208, 14 S. Ct. 410 (1894), due to his ignorance of this basic statutory protection. This error would not have been difficult for counsel to avoid. A mere reading of the basic peremptory challenge statute would have revealed that capital defendants were guaranteed twenty peremptory

challenges. *See* Cal. Code Civ. Pr. § 231(a) (defendant charged with offense punishable by death or life imprisonment is entitled to twenty peremptory challenges). Counsel's failure to make even this minimal effort to protect such an important right constitutes deficient performance. *See*, *Morris v. California*, 966 F.2d 448, 454-55 (9th Cir. 1992) (ignorance of law and failure to research legality of methamphetamine use was ineffective assistance); *Green v. United States*, 972 F. Supp. 917, 920 (E.D. Pa. 1997) (failure to appeal improper denial of statutorily authorized peremptory challenge was ineffective).

By requiring Vansickel to demonstrate that the erroneous denial of half of his rightful allotment of peremptory challenges substantially influenced the outcome of his case, the majority has demanded an impossible showing and therefore erected an insurmountable barrier to vindication of an important constitutional right. Because rendering a constitutional right unenforceable is an unacceptable result, the presumption of prejudice that normally applies in a case in which a criminal defendant has been denied statutorily guaranteed peremptory challenges applies equally in the case of *Strickland* error. In jury composition cases, whatever the context, the impossibility of proof of prejudice is identical. By concluding otherwise, and abandoning *Hines*, the majority erred. I therefore dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL EDWARD VANSICKEL, Petitioner-Appellant,	)	No. 97-17143
v.	)	DC# CV-95-01355-WBS
THEO WHITE, Warden, Respondent-Appellee.	)	ORDER

Before: REINHARDT, NOONAN and THOMPSON, CIRCUIT JUDGES.

Both sides have filed petitions for rehearing and petitions for rehearing en banc. Judges Noonan and Thompson voted to deny the petitions for rehearing filed by the appellant Vansickel and by the appellee White. Judges Noonan and Thompson also recommended denial of the petitions for rehearing en banc filed by the appellant Vansickel and by the appellee White.

Judge Reinhardt voted to grant the petition for rehearing and the petition for rehearing en banc filed by the appellant Vansickel. Judge Reinhardt voted to deny the petition for rehearing and petition for rehearing en banc filed by the appellee White.

The full court was advised of the petitions for rehearing and for rehearing en banc filed by the appellant Vansickel and by the appellee White. No judge of the court requested a vote on either of the petitions for rehearing en banc. Fed.R. App.P.35(b).

The petitions for rehearing and for rehearing en banc filed by the appellant Vansickel and by the appellee White are denied.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL EDWARD VANSICKEL,	)	NO. CIV. S-95-1355 WBS JFM P
Petitioner,	)	
v.	)	FINDINGS AND RECOMMENDATIONS
THEO WHITE, et al.,	)	
Respondents.	)	

Petitioner is a state prisoner proceeding by counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On May 25, 1992, the Tehama County Superior Court convicted petitioner of first degree murder with the special circumstance of lying-in-wait. Petitioner challenges his conviction on the following grounds:

(1) The trial court erred in denying petitioner's motion to exclude his statements;

(2) The trial court erred in denying petitioner's motion for a judgment of acquittal as to the special circumstance;

(3) The trial court erred in instructing the jury;

(4) The evidence was insufficient to support the special circumstance finding;

(5) The trial court erred in denying the motion for new trial;

(6) Petitioner was denied the effective assistance of counsel;

(7) Petitioner was not competent to stand trial;
(8) The cumulative effect of the errors requires reversal.

PROCEDURAL HISTORY[1]

Petitioner was convicted of first degree murder with a lying-in-wait special circumstance on May 25, 1992. On July 13, 1992, the Tehama County Superior Court sentenced petitioner to life imprisonment without the possibility of parole. Petitioner appealed his conviction on July 22, 1992. The Third District Court of Appeal of California affirmed petitioner's conviction on April 29, 1994. The California Supreme Court denied review on July 21, 1994. Petitioner's applications for a writ of habeas corpus were denied by the Third District Court of Appeal of California on October 6, 1994, and by the California Supreme Court on February 22, 1995.

Petitioner filed an application for a writ of habeas corpus with this court on July 26,1995.

FACTUAL BACKGROUND[2]

> On September 30, 1991, around 11:25 p.m., [petitioner] and the victim, Mark Howard, were in a car that crashed into a drainage ditch in Corning. Shortly afterwards, a resident in the area spotted [petitioner] "scooting across" a nearby lawn stating that his friend had been

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1. The procedural history set forth here is taken from the petition at 2-4 and respondents' answer at 5-6.

2. The factual background is taken from the unpublished opinion of the California Court of Appeal, Third Appellate District, filed on April 29, 1994.

shot, he didn't do it, and he needed a ride. [Petitioner] also said not to call the police.

Police found Howard still in the car. He had no vital signs and his face was covered with blood.

[Petitioner] was found lying in a driveway. When officers approached, [petitioner] told them that he had the murder weapon and that they would not believe him. When the officers asked what he meant by the "murder weapon," [petitioner] displayed a gun barrel which he had wrapped in a blood-soaked T-shirt in his right hand.

The officers took cover after [petitioner] refused to drop the gun. [Petitioner] repeatedly stated that the officers would never believe him and then said he was going to shoot himself. The officers then heard a shot and the sound of a gun hitting the ground. When the officers again approached [petitioner], they found that he had not shot himself but he had broken his hip in the car accident. One officer noted that during this encounter, [petitioner] acted erratically and did not seem to respond in logical fashion to the request to put the gun down. Another officer noted that [petitioner] appeared emotionally upset but understood what the officers were saying. The officers recovered the gun, a Ruger .22-caliber revolver.

Shortly thereafter, at just past midnight, Corning Police Officer Charles Fiske interviewed [petitioner] at the hospital. [Petitioner] told Fiske that he and Howard went to Woodson

Park where Howard saw a friend of his by the name of Dan. The three of them drove to get a beer. While they were driving, [petitioner] heard Dan cock a gun and say, "Bend forward. Mark's a rat." Dan then shot Howard. The car crashed. Dan got out and ran away, and [petitioner] tried to pursue him.

Agent Gerald Finchum interviewed [petitioner] in the hospital the next morning (Oct. 2, 1991). [Petitioner] stated that his girlfriend had told him that Howard had been telling people that [petitioner] was a snitch. [Petitioner] added that Howard had been seeing his girlfriend before and after the two of them broke up around September 25.

Later that evening (still October 2, 1991), around 7:20 p.m., Agent Todd Lofgren interviewed [petitioner] and tape-recorded the interview. [Petitioner] repeated the story about Dan, adding that he ([petitioner]) had initially encountered Howard at Stacey Craig's home and that during the drive [petitioner] was seated in the middle of the three men on the console.

Billie Jo Ruspoli, the [petitioner's] former girlfriend, visited [petitioner] in the hospital. At first, he told her that a person named Dan was in the car and had shot Howard. Ruspoli later pressed for an explanation and [petitioner] confided that he had "put two rounds into Mark [Howard]." [Petitioner] explained that Howard had "messed up with his connection" and had called him a rat. [Petitioner] also told Ruspoli that Dan was "just someone [petitioner] made up so the cops couldn't put it on [him]."

Ruspoli had a romantic relationship with [petitioner] during the summer of 1991. While [petitioner] was out of town for a few weeks in August of that year, Ruspoli spent some time with Howard. In September, [petitioner], thinking that Ruspoli and Howard were romantically involved, confronted the two of them at the home of a mutual friend; [petitioner] drew a knife and told Howard that he ought to slit his throat. Ruspoli intervened and explained that "it wasn't what [petitioner] thought it was;" [petitioner] then apologized to Howard.

Ruspoli began hearing rumors that [petitioner] was a police informant. At one point, [petitioner] said he was "going to slit the throat of some rat." Ruspoli broke off her relationship with [petitioner] on September 27 and he became angry. She continued to spend time with Howard.

A pathologist testified that Howard died from two gunshot wounds to the head. An examination of gunpowder residue indicated the gun was fired at a distance from 1 to 42 inches. The bullet fragments removed from Howard's head were consistent with a .22 caliber.

Three or four days before the shooting, [petitioner] barged into the home of Bonnie Puccetti, looking for Howard. [Petitioner] appeared anxious and upset, but left after being told that Howard was not there.

On the evening of the shooting, September 30, Howard visited Ruspoli. He left

around 11 p.m. and went to the home of Stacey Craig and Donna Herbst. He was there for about half-an-hour, when someone knocked on the door. Howard answered the door and then told Craig and Herbst, who were in another room, that he had to "give Mike a ride. I'll be back."

An expert in accident investigation, William Killion, opined that Howard's car contained only the driver and one passenger when it crashed. The passenger, however, was either trying to get into the driver's area or was partially straddling the console area when the crash occurred. [Petitioner's] injuries were consistent with his being seated on or near the console. Additionally, [petitioner's] hand injury was consistent with holding a weapon when the car crashed.

[Petitioner] had borrowed the gun used to shoot Howard from Thomas Walker who had borrowed it from George Bishop. The day before Howard was shot, Walker contacted [petitioner] to retrieve the gun but at [petitioner's] request allowed him to keep it for one more day.

In late October 1991, while [petitioner] was in jail awaiting trial, he became upset about something he had read in the Penal Code and wanted to talk to someone about his case. He said he had shot a man. He stated he was angry and had to shoot him, and did not mind admitting this in court because he had already spoken to Officer Fiske about it. He also stated

that even though he knew the man was dead, he shot him a second time.

Two notes that [petitioner] had written in jail were admitted into evidence. One stated in part:

> "I think I fucked up by telling them that there was one more person in the car that he shot Mark. I gave them a fony [sic] description an [sic] what he was wearing. Fuck pony man when my face whent [sic] through the windshield of the car an [sic] my hip got broke in half I don't know I really don't know what whent [sic] on after that but all I know is when I finally came to I was serounded [sic] by cops an [sic] I still had the fucken [sic] gun in my hand. [¶] I don't know how, how in the fuck the car started going because I told him to stop the car let's get high an [sic] as soon as the car stopped bam bam an [sic] the fucken [sic] car just fucken [sic] took fucken [sic] off an [sic] the crash smash an [sic] ouch you know so I had to say some then [sic] to the cops so I made up this Dan . . . ."

Timothy Morton testified for the defense that he spoke with Howard the day before he died. Howard implied that [petitioner] was an informant; Howard was also angry and made threats against [petitioner]. Later that day, Morton saw [petitioner] and told him that Howard was looking for him and had accused him of being a snitch. [Petitioner] became angry.

> At trial, [petitioner] conceded he had shot Howard. By stipulation, a document showing the results of a toxicology report on [petitioner] was admitted into evidence. The document disclosed that on October 1, 1991, at 11:15 a.m., a urine sample was taken from [petitioner] indicating the presence of a cocaine metabolite, THC metabolites, amphetamine, and methamphetamine.

ANALYSIS

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)), *cert. denied*, 478 U.S. 1021 (1986); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). It is not available for alleged error in the interpretation or application of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Givens v. Housewright*, 786 F.2d 1378, 1381 (9th Cir. 1986); *Middleton*, 768 F.2d at 1085.

I. Ground One: Miranda Violations

Petitioner challenges the trial court's admission of statements he made to Agent Lofgren. Petitioner asserts that Agent Lofgren did not read him his rights, as required by *Miranda v. Arizona*, and that Agent Lofgren elicited statements from him after he invoked his right to remain silent.

A. Adequacy of Miranda Warnings

Petitioner claims Agent Lofgren failed to advise him of his *Miranda* rights before he made incriminating

statements, in violation of petitioner's rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In *Miranda*, the United States Supreme Court held that, prior to custodial interrogation of a criminal defendant, the defendant must be warned of his right to remain silent, that any statement he makes can be used against him, and that he has the right to an attorney, either retained or appointed. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A criminal defendant may waive these rights if the waiver is made voluntarily, knowingly and intelligently. *Id.* "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Id.* at 479. In establishing this standard, the Supreme Court was concerned with ensuring that the accused is aware of these rights. *Id.* at 472. In cases where there is direct evidence that a criminal defendant was aware of these rights, he cannot claim that he was not apprised of the *Miranda* rights, even if the *Miranda* warnings in and of themselves were insufficient. *United States v. Pheaster*, 544 F.2d 353, 366 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977).

In the instant case, Officer Fiske questioned petitioner the day before Agent Lofgren did so. According to Officer Fiske's police report, when he started to advise petitioner of his rights prior to the questioning, petitioner replied, "Yeah, I know them, I can say them better than you can . . . ." (Resp.'s Ans., Ex. A at 8.) Officer Fiske again tried to give petitioner his *Miranda* warnings and asked if petitioner understood his rights, to which petitioner responded that he understood and would talk to Officer Fiske about the incident. (*Id.* at 9.) At trial, Officer Fiske testified to this account of the facts. (*Id.*) The California Court of Appeal found that the state had proven by a preponderance of the evidence that Officer Fiske had given petitioner *Miranda* warnings and

that petitioner knowingly and voluntarily waived his rights. (*Id.* at 10.)

Agent Lofgren did not advise petitioner of his rights when he questioned petitioner the day after Officer Fiske's interview of petitioner. At trial, petitioner moved to exclude statements he made to Agent Lofgren. In response, the prosecutor argued that the waiver of petitioner's rights prior to Officer Fiske's interrogation applied to petitioner's statements to Agent Lofgren as well. The record reflects that Agent Lofgren asked petitioner whether he had been advised of his *Miranda* rights. (*Id.* at 9.) Petitioner responded that Officer Fiske had advised him of his fights and that he had waived them. (*Id.*) The trial court found that Agent Lofgren properly advised petitioner of his rights by referring to Officer Fiske's advisement the day before, thus ensuring that petitioner knew his rights, and by determining that petitioner had waived his rights before speaking to Officer Fiske.

In *Pheaster*, the court found that the defendant's act of interrupting the agent giving him *Miranda* warnings and insisting that he knew his rights constituted direct evidence that the defendant knew his rights. *Pheaster*, 544 F.2d at 366. In addition, the Ninth Circuit has recognized that warnings given by one interrogator can apply to a subsequent interrogation by a different officer. *Maguire v. United States*, 396 F.2d 327, 331 (9th Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969). In *Maguire*, the court found that although a second interrogator's *Miranda* warnings to the appellant were insufficient, the appellant nevertheless knew his rights because the first interrogator had properly given him Miranda warnings three days beforehand. *Id.* Accordingly, this court finds that the trial court did not err in denying petitioner's motion to exclude the statements made to Agent Lofgren on the ground that Agent Lofgren failed to read petitioner his *Miranda* rights.

B. Invocation of Right to Remain Silent

Petitioner claims that some of the statements he made to Agent Lofgren were inadmissible because he had invoked his right to remain silent.

A custodial interrogation must cease if an individual being questioned indicates that he wishes to remain silent. *Miranda*, 384 U.S. at 473-74. Statements made after an individual invokes the right to remain silent are admissible only when the "'right to cut off questioning [is] scrupulously honored.'" *United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994) (quoting *Michigan v. Mosley*, 423 U.S. 96, 104 (1975)).

The portion of the interrogation in question occurred near the end of the interview and proceeded as follows:

> Lofgren: You saw him standing outside the car, was he tall or short?
>
> VanSickel: (Pause) I don't know. I'm through talking man. It don't matter. Book me for murder 1, I give fuck. You're going to do it anyway. If they'd have told me last night they can't find the third party and they're gonna book you for it, so you might as well get it over with.
>
> Lofgren: Who told you that?
>
> VanSickel: Officer Fiske. You might as well get your fuckin' game over with. And I'll put the word out on the street and have him tooken [sic] care of myself.
>
> Lofgren: You don't want to talk anymore?

> VanSickel: Nope. (Pause) They should have killed me last night, so I wouldn't have to go through this shit. I didn't have the gutts [sic] to shoot myself and them [sic] mother fuckers didn't have the gutts [sic] to shoot me either.
>
> Lofgren: Why did you want to shoot yourself?

(RT Vol. I, Ex. 1 at 8.)

At trial, petitioner asserted that he had invoked his right to remain silent. He objected to the admission of his statements to Agent Lofgren subsequent to the alleged invocation of his fight to remain silent. The trial judge overruled petitioner's objection and admitted the statements, explaining that "Mr. Vansickle [sic] was in part answering the questions, in part telling a story that he wanted to tell that do [sic] not always respond to the question, in part just indicating his innocence or his frustration, his feeling that it was futile to do anything or say anything." (RT 261.) The record reflects that petitioner said he was "through talking," but continued to talk. Agent Lofgren attempted to clarify by asking petitioner, "You don't want to talk anymore?" Petitioner responded "nope," but again continued to talk. On this record, this court finds that the trial court did not err in admitting petitioner's statements to Agent Lofgren subsequent to the alleged invocation of the fight to remain silent.

Moreover, petitioner would not be entitled to habeas relief even if this court were to find that petitioner invoked his fight to remain silent, that Agent Lofgren did not scrupulously honor petitioner's invocation of the fight, and that the trial court improperly admitted petitioner's statements to Agent Lofgren after the invocation of the fight to remain silent. The improper admission of a confession is trial error. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). For a trial error to be reversible on

federal habeas review, the error must have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). In the instant case, petitioner invoked his right to remain silent near the end of the interview. Further, petitioner's statements to Agent Lofgren were almost identical to his statements to Officer Fiske. (RT Vol. I, Ex. 1 at 8-11, RT 351-52.) Under these circumstances, the court is unable to find that the admission of petitioner's statements to Agent Lofgren following petitioner's alleged invocation of his right to remain silent had a substantial and injurious effect or influence on the jury's verdict.

Accordingly, this court finds that the trial court did not violate petitioner's constitutional rights by admitting the statements made by petitioner to Agent Lofgren.

II. Grounds Two and Four: Insufficient Evidence as to the Special Circumstance

Along with first degree murder, petitioner was convicted of the special circumstance of lying-in-wait. Petitioner claims that the prosecution failed to produce sufficient evidence to support a finding of lying-in-wait beyond a reasonable doubt. Petitioner also claims that because the evidence was insufficient, the trial court erred in denying his motion for acquittal as to the special circumstance.

A conviction based on insufficient evidence violates due process. *In re Winship*, 397 U.S. 358, 365 (1970). When a challenge is brought alleging insufficient evidence, federal habeas corpus relief is available only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). In conducting its review, the court

is required to "consider[] all the evidence in the light most favorable to the prosecution and defer[] to the trier of fact's presumed resolution of conflicting inferences most favorably to the prosecution." *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992), *cert. denied*, 510 U.S. 843 (1993). A reviewing court "'faced with a record of historical facts that supports conflicting interests must presume -- even if it does not affirmatively appear on the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Wright v. West*, 505 U.S. 277, 296 (1992) (quoting *Jackson*, 443 U.S. at 319). The trier of fact is entitled to disbelieve a defendant's uncorroborated testimony, to take into account a defendant's demeanor when testifying, and to consider whether disbelieved testimony may be affirmative evidence of guilt. *Wright*, 505 U.S. at 296.

The standards set forth above "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16. Under California law, there are three requirements to prove the lying-in-wait special circumstance: (1) concealment of purpose; (2) substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage. *People v. Morales*, 48 Cal. 3d 527, 557 (1989). A finding of these elements beyond a reasonable doubt justifies distinguishing the murder from an ordinary premeditated murder by treating it as murder with a special circumstance. *Id.*

Concealment of purpose can be shown by an ambush or "by the creation of a situation where the victim is taken unawares even though he sees his murderer." *Id.* at 554. The record reflects that shortly before the murder, Howard was at the home of Stacey Craig and Donna Herbst. (RT 233.) After answering a knock at the door, Howard told Craig and Herbst that he needed to leave in order "to give Mike a ride." (RT 235.) While

driving with petitioner, petitioner asked Howard to stop the car so that they could "get high." (RT 412.) Petitioner shot Howard as soon as the car stopped. (*Id.*) Thus, sufficient evidence existed to allow a rational jury to find that petitioner concealed his purpose to murder Howard by luring Howard from Craig and Herbst's home and convincing Howard to stop the car in order to use drugs.

The second element of the lying-in-wait special circumstance is that there was a substantial period of watching and waiting for an opportune time to act. *Morales*, 48 Cal. 3d at 557. The record reflects that a few days prior to the murder petitioner borrowed a gun from Thomas Walker "just for a day or two." (RT 190-92.) When Walker asked for the gun back on the day before the murder, petitioner requested permission to borrow the gun for another day. (RT 192-93.) Petitioner entered Bonnie Puccetti's home without knocking a few days before the murder. (RT 365-66.) Petitioner, sounding upset, asked Puccetti where Howard was. (RT 366, 386-87.) When Puccetti told petitioner that Howard was not there, petitioner left immediately. (RT 366-67.) On the night of the murder, petitioner rode with Howard in the car and waited until they had driven away from Craig and Herbst's home and Howard had stopped the car before he shot Howard. (RT 412.) Based on the above, this court finds sufficient evidence for a rational jury to find that petitioner watched and waited for an opportune time to murder Howard.

The third element the prosecution must show is that the petitioner launched a surprise attack on, an unsuspecting victim from a position of advantage. *Morales*, 48 Cal. 3d at 557. The record reflects that petitioner convinced Howard to stop the car in order to use drugs, whereupon petitioner immediately shot Howard twice. (RT 412.) This evidence supports the inference that Howard, by stopping the car in order to use drugs

with petitioner, was an unsuspecting victim and that petitioner's act of shooting Howard as soon as the car stopped was a surprise attack. As a result, a rational jury could find that the prosecution established this third element beyond a reasonable doubt.

Accordingly, this court finds that sufficient evidence existed for a rational jury to find the lying-in-wait circumstance beyond a reasonable doubt. Because the evidence was sufficient, the trial court did not err in denying petitioner's motion for judgment of acquittal as 'to the lying-in-wait special circumstance.

III. Ground Three: Jury Instruction Error[3/]

Federal habeas corpus relief is not available for failure to give a jury instruction unless the failure so infects the entire trial that the resulting conviction violates due process, rendering the trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991); *Duckett v. Godinez*, 67 F.3d 734, 745-46 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1549 (1996). The federal court must evaluate jury instructions "in the context of the overall charge to the jury as a component of the entire trial process." *Prantil v. California*, 843 F.2d 314, 317 (9th Cir.) (citing *Bashor v. Risley*, 730 F.2d 1228, 1239 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984)), *cert. denied*, 488 U.S. 861 (1988). Where the issue involves alleged failure to give an instruction, the petitioner's burden is "especially heavy" because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a

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3. Respondents argue that this court should apply the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 to the instant case. The Ninth Circuit has held that this Act does not apply retroactively to cases filed prior to April 24, 1996. *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996). Because the instant petition for writ of habeas corpus was filed on July 26, 1995, the Act does not apply.

misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

A. Voluntary Manslaughter Instruction

Petitioner claims that the trial court modified the instruction on provocation to exclude voluntary manslaughter to his detriment. CALJIC 8.73 reads:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, *but the provocation was not sufficient to reduce the homicide to manslaughter,* you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.

Petitioner challenges the omission of the italicized language above. Petitioner claims that this omission and the refusal by the trial court to instruct the jury on voluntary manslaughter violated his right to due process. He argues that there was sufficient evidence of provocation based on his jealousy of the relationship between Howard and Ruspoli and that this evidence warranted a heat of passion instruction to the jury, which could have reduced his conviction to voluntary manslaughter.

In order to be entitled to a voluntary manslaughter instruction based on heat of passion, a criminal defendant must establish two things. First, there must be evidence of sufficient provocation which led to the act. *People v. Sedeno*, 10 Cal. 3d 703, 719 (1974). The provocation must be "to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than judgment." *People v. Wharton*, 53 Cal. 3d 522, 570 (1991) (citing *People v. Rich*, 45 Cal. 3d 1036, 1112 (1988)).

In the instant case, Ruspoli began spending time with Howard in August, 1991. (RT 208.) Petitioner once confronted Howard with a knife because he believed that Howard and Ruspoli were romantically involved. (RT 209-10.) When Ruspoli broke off her relationship with petitioner, petitioner became angry. (RT 213.) Petitioner had previously told Ruspoli that if she were ever to leave him, "people in town were going to go down." (RT 218.) California courts have held that the mere act of dating another by a person formerly involved with a criminal defendant does not constitute sufficient provocation that would cause a reasonable person to act rashly without due deliberation and reflection. *People v. Hyde*, 166 Cal. App. 3d 463, 473 (1985). Thus, petitioner's belief that Ruspoli was romantically involved with Howard did not constitute sufficient provocation to support the heat of passion defense.

Second, in order to establish the heat of passion defense, "the actor [must] be under the actual influence of a strong passion at the time of the homicide." *People v. Wickersham*, 32 Cal. 3d 307, 327 (1982). The existence of such a strong passion eliminates malice, reducing a homicide to voluntary manslaughter. *People v. Sedeno*, 10 Cal. 3d 703, 719 (1974). "[D]efendant's jealousy must be such as to suggest he did not either intend to kill or act in conscious disregard of a substantial probability that death would result." *Hyde*, 166 Cal. App. 3d at 473. Any notion that a criminal defendant lacked intent due to heat of passion is eroded when "'sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return. . . .'" *Wickersham*, 32 Cal. 3d at 327 (quoting CALJIC 8.42). In the instant case, evidence of watching and waiting shows the existence of sufficient time for passion to subside and specific intent to kill to develop. Petitioner borrowed a gun a few days prior to the killing. (RT 190-92.) Petitioner also had sought Howard prior to the murder, entering Bonnie

Puccetti's home without knocking. (RT 365-66.) On the night of the killing, petitioner asked Howard to give him a ride home and during the ride petitioner waited until Howard stopped the car to shoot him. (RT 412.) The record does not reflect sufficient provocation and demonstrates that petitioner did not kill Howard under the actual influence of strong passion. Accordingly, the trial court's refusal to instruct the jury on voluntary manslaughter based on heat of passion did not render the trial so fundamentally unfair as to deprive petitioner of due process.

B. Voluntary Intoxication Instruction

Petitioner claims that the trial court improperly failed to instruct the jury on voluntary intoxication as it relates to specific intent. Because California no longer recognizes the defense of diminished capacity, voluntary intoxication is relevant only to show that a criminal defendant lacked specific intent to commit a crime. *People v. Saille*, 54 Cal. 3d 1103, 1119 (1991). A court must instruct the jury on intoxication "upon request when there is evidence supportive of the theory, but [such instructions] are not required to be given sua sponte." *Id.* In the instant case, the record reveals that petitioner did not request an instruction for voluntary intoxication. Because the trial court was not required to instruct the jury on intoxication in the absence of such a request, the court's failure to do so did not render the trial fundamentally unfair and did not violate petitioner's right to due process.

C. Failure to Define and Instruct on Provocation

Petitioner claims that the trial court instructed the jury that it could consider provocation in distinguishing between first and second degree murder but did not offer

an instruction defining provocation, as a result of which the jury could not properly apply the concept of provocation. Therefore, petitioner alleges, it was error for the trial court to refuse to give petitioner's proposed special instruction, which defines provocation and gives the jury guidance as to how to apply the concept of provocation. Petitioner's proposed instruction reads:

> If the provocation aroused the passion of defendant sufficiently to negate premeditation and deliberation on his part, and if insufficient time elapsed between the provocation and the fatal blow for defendant's passion to subside and his reason to return, then the homicide, if murder would be of the second degree.
>
> You are entitled to consider the defendant's subjective state of mind in this regard and are not required to consider whether passion would be aroused in the mind of an ordinarily reasonable person in the same circumstances.

(CT 112.)

The trial court instructed the jury on first degree murder and provocation as follows:

> All murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree
>
> . . . .
>
> If you find that the killing was preceded and accomplished by a clear, deliberate attempt -- intent on the part of the Defendant to kill, which is the result of deliberation, premeditation, so

that it must have be [sic] formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

. . . .

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include [sic] an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the questions of killing and the reasons for and against such choice and, having in mind the consequences, he decides to and does kill.

Murder of the second degree is the unlawful killing of a human being with malice aforethought when there's manifested an intention to unlawfully to [sic] kill a human being but the evidence is insufficient to establish deliberation and premeditation.

. . . .

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a Defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give

> the Defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.
>
> When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree.

(RT 545-46.)

The trial court offered precise definitions for first and second degree murder and instructed the jury that a finding of first degree murder required them to find no existence of a condition precluding deliberation by the petitioner. After discussing and defining the requirements of premeditation and deliberation for first degree murder, the court also instructed the jury that it could consider any evidence of provocation in deciding whether the murder was of the first degree.

After evaluating the jury instructions as a whole, this court finds that the trial court gave sufficient instructions to enable the jury to consider the role of provocation in determining whether petitioner committed first or second degree murder. Due process did not require the trial court to elaborate further, and the trial court's refusal to give petitioner's proposed instruction did not render the trial so fundamentally unfair as to deprive petitioner of his right to due process.

D. Failure to Modify the Special Circumstances Instruction

Petitioner claims that the trial court improperly instructed the jury using the language of CALJIC 8.81.15.

This instruction informed the jury on the standard for finding the special circumstance of murder while lying in wait. The trial court instructed the jury:

> To find the special circumstance, referred to in these instructions as murder while laying [sic] in wait, is true, each of the following facts must be proved:
>
> 1. That the Defendant intentionally killed the victim.
>
> 2. That the murder was committed by the Defendant was [sic] lying in wait.
>
> The term "while lying in wait" within the meaning of the law of special circumstances is defined as awaiting [sic] and watching for an opportune time to act, together with concealment by ambush or some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence . . . .
>
> . . . .
>
> . . . . However, when a Defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, a special circumstance of murder while lying in wait has been established.
>
> . . . .

> Further, each fact essential to complete a set of circumstances necessary to establish the truth of the special circumstance must be proved beyond a reasonable doubt.

(RT 549-51.)

Under California law, there are three requirements to prove the lying-in-wait special circumstance: (1) concealment of purpose; (2) substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage. *People v. Morales*, 48 Cal. 3d 527, 557 (1989). A finding of these elements beyond a reasonable doubt justifies distinguishing the murder from an ordinary premeditated murder by treating it as murder with a special circumstance. *Id.* A review of the instructions as a whole reveals that the trial court gave the jury the proper standards under California law for finding a lying-in-wait special circumstance. Further, this court has found that sufficient evidence existed for a rational jury to find beyond a reasonable doubt that petitioner murdered Howard while lying in wait. Accordingly, the trial court's use of CALJIC 8.81.15 did not render the trial so fundamentally unfair as to deprive petitioner of his right to due process guaranteed by the federal constitution.

IV. Ground Five: Trial Court's Denial of Petitioner's Motion for a New Trial

Following his conviction, petitioner filed a motion for a new trial. Petitioner argued that the trial court allowed him only ten peremptory challenges during jury selection, while California Code of Civil Procedure § 231 entitles a criminal defendant to twenty peremptory challenges when the defendant is on trial for an offense which is punishable by life imprisonment. (CT 143-50.)

The trial court denied the motion for a new trial. (CT 156.)

The record contains an indication that petitioner's counsel, during a conference prior to the trial, stated that it was his understanding that petitioner was entitled to ten peremptory challenges, and the trial judge agreed. (RT 578.) Petitioner used ten peremptory challenges during jury selection. (CT 148.) Subsequent to the jury verdict, the trial judge realized that petitioner was entitled to twenty peremptory challenges. (RT 580.) The judge immediately informed both parties of the error. (*Id.*) Petitioner then filed his motion for a new trial. (CT 143.) Petitioner's counsel declared that during the conference he asked the trial judge how many peremptory challenges he was allowed, and the judge told him ten. (CT 147.) In hearing oral arguments on petitioner's motion for new trial, the judge conceded that petitioner had not been given twenty peremptory challenges and that it was the court's error. (RT 577-78, 580-82.)

"The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. . . . Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894). "[P]eremptory challenge is a necessary part of trial by jury." *Swain v. Alabama*, 380 U.S. 202, 219 (1965). Although a criminal defendant does not have a constitutional right to exercise peremptory challenges, it is a constitutional violation to deny a criminal defendant peremptory challenges when the law of the jurisdiction in which the defendant is on trial grants him that right. *Hines v. Enomoto*, 658 F.2d 667, 671-72 (9th Cir. 1981), *cert. denied* 463 U.S. 1211 (1983). "The 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988). It is reversible

error for a court to deny a defendant statutorily-granted peremptory challenges. *Hines*, 658 F.2d at 672. Such a denial is prejudicial error, without a showing of actual prejudice. *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) (citing *Swain*, 380 U.S. at 219; *United States v. Turner*, 558 F.2d 535, 538 (9th Cir. 1977)).

Respondents, citing *Ross*, 487 U.S. at 88, assert that the denial of peremptory challenges does not necessarily preclude selection of an impartial jury. The Ninth Circuit has held, however, that the outright denial of a peremptory challenge, as opposed to the forced use of a peremptory challenge, as occurred in *Ross*, requires automatic reversal. *United States v. Annigoni*, 96 F.3d 1132, 1146-47 (9th Cir. 1996). The distinction to be drawn is whether the petitioner was able to exercise all of the peremptory challenges to which he is entitled by law. *Id.* In *Ross*, although the petitioner was forced to use a peremptory challenge when the trial court erroneously failed to excuse a juror for cause, the petitioner was able to use the full number of peremptory challenges to which he was entitled. *Ross*, 487 U.S. at 91. When the actual number of peremptory challenges used does not equal the number permitted by law, *Ross* does not apply. *Annigoni*, 96 F.3d at 1146-47.

In the instant case, as in *Hines*, petitioner was denied use of half of the peremptory challenges to which he was entitled under the applicable state statute. California Code of Civil Procedure § 231 grants twenty peremptory challenges to a criminal defendant on trial for a crime punishable by death or life imprisonment.[4/]

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4. California Code of Civil Procedure § 231 is the successor to § 1070 of the California Penal Code of 1872. Like the statute currently in effect, the original Penal Code section provided that a defendant was entitled to twenty peremptory challenges if the offense charged was punishable with death or life imprisonment. An amendment to the statute increased the number of challenges to

Respondents contend, however, that this claim is procedurally barred. Federal courts will not ordinarily review a habeas petitioner's claims if the state court decision denying relief rests on a state law ground that is both independent of federal law and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Harris v. Reed*, 489 U.S. 255, 260-62 (1989). In order to obtain a new trial because of improper denial of peremptory challenges, California law requires that the defendant make a timely objection. *People v. Caro*, 46 Cal. 3d 1035, 1046-47 (1988). It is clear that no timely objection was made by petitioner's trial counsel. (Resps.' Ans. Ex. B (Appellant's Opening Br.) at 33-38.)

In order to invoke the doctrine of procedural default it is essential (*inter alia*) that the state court have relied on the procedural rule asserted. If the state court "fails to articulate that state procedural grounds form an independent basis for the decision so that the federal court is left to conjecture concerning whether the matter was disposed of on a separate and independent state ground, the decision will be insufficient to bar federal review." *Karis v. Vasquez*, 828 F. Supp. 1449, 1460 (E.D. Cal. 1993); *see also Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1175 (1995). An unexplained order by the state's highest court requires the federal court to look through to the last reasoned state court opinion. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

In the instant case, the last reasoned state court opinion on petitioner's claim was that of the state appellate court. The California Court of Appeal clearly asserted the state procedural rule. (Resps.' Ans. Ex. A

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twenty six for a period of time. *See People v. Yates*, 669 P.2d 1, 2 (Cal. 1983) (in bank). Under the statute in effect when petitioner was tried in 1992, petitioner was entitled to twenty peremptory challenges.

(Third Dist. Ct. App. Op. filed Apr. 29, 1994) at 30-31 (citations omitted).)

When a habeas petitioner has not complied with an independent and adequate state rule barring an otherwise valid claim, the claim is deemed procedurally barred and the federal court may not ordinarily consider the claim on its merits. *Hines*, 658 F.2d at 673. However, a procedural default may be set aside when the petitioner establishes both cause for failing to object at trial and prejudice resulting from the alleged error. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

The Ninth Circuit has held that counsel's ignorance of the law constitutes cause. *Garrison v. McCarthy*, 653 F.2d 374, 377-78 (9th Cir. 1981). In demonstrating counsel's failure to object due to ignorance of the law, the petitioner is not required to make the showing which would establish deprivation of the right to counsel under the Sixth Amendment. *Garrison*, 653 F.2d at 377-78. Deliberate failure to object by counsel based on a strategic decision, on the other hand, does not satisfy the cause requirement. *Id.* at 377. It is therefore necessary for this court to consider the reason for counsel's failure to object to the ten-peremptory limit imposed by the trial court. *Hines*, 658 F.2d at 673.

The record indicates that before the trial petitioner's counsel told the trial judge he believed he was entitled to ten peremptory challenges. (RT 578.) The judge agreed, and the prosecuting attorney was silent. (*Id.*) Petitioner's counsel did not object to the improper denial of ten additional peremptory challenges until after the trial judge informed him of the error, which occurred subsequent to the trial. (RT 580.) At the hearing on petitioner's motion for a new trial, the trial court found that counsel failed to object because he "was under, the mistaken belief that there were only ten peremptory challenges when in reality the law provides that there should be 20." (RT 579.) Counsel himself declared that

he had believed that petitioner was entitled to only ten peremptory challenges. (CT 148.) Based on the record, this court finds that counsel's failure to object at trial was due to ignorance of the law. Accordingly, petitioner has met the cause requirement under *Sykes*.

Petitioner must also show he was prejudiced by the error. *Sykes*, 433 U.S. at 87. In order to show prejudice, petitioner must establish that "his state trial counsel would have challenged another juror or jurors had he been aware of the remaining challenges." *Hines*, 658 F.2d at 674. In petitioner's motion for a new trial, petitioner's counsel declared that he had written on his jury chart during voir dire a note about excusing another juror. (CT 148.) Counsel was unable to excuse that juror because he used ten peremptory challenges to excuse other jurors. (*Id.*) In addition, counsel declared that he would have exercised additional peremptory challenges to try to reach two other jurors who might have been more advantageous to petitioner. (*Id.*) Petitioner has thus shown prejudice by establishing that his state trial counsel would have challenged another juror or jurors had counsel been aware of the entitlement to additional challenges.

Petitioner has met the requirements for setting aside the procedural default that resulted from counsel's failure to object in a timely manner. Once a petitioner "satisfies the *Wainwright v. Sykes* 'cause and prejudice' standard, then the writ will issue." *Hines*, 658 F.2d at 675. Under the circumstances of this case, this court finds that the trial court's denial of petitioner's right to exercise twenty peremptory challenges during jury selection and the denial of petitioner's motion for a new trial violated petitioner's right to due process and the right to an impartial trial guaranteed by the Sixth Amendment. Petitioner is entitled to relief on this ground.

V. Ground Six: Ineffective Assistance of Counsel

To obtain relief on habeas corpus review for a claim of ineffective assistance counsel, petitioner must demonstrate that counsel "made errors that a reasonably competent attorney acting as a diligent and conscientious advocate would not have made" and that he was prejudiced by counsel's errors. *Butcher v. Marquez*, 758 F.2d 373,375-76 (9th Cir. 1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. To this end, petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. *Id.* at 690. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of competent professional assistance." *Id.* "We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made." *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990).

If counsel's acts or omissions were outside the wide range of competent professional assistance, then petitioner must affirmatively prove that prejudice resulted from the acts or omissions. *Strickland*, 466 U.S. at 693. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Prejudice may not be found unless the result of the proceeding was fundamentally unfair or unreliable because of counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 368-69 (1993).

A. Failure to Object to Admission of Statements Made to Officer Fiske

Petitioner first claims that his counsel was ineffective because he did not object to the admission of statements petitioner made to Officer Fiske. This court has found that Officer Fiske's issuance of *Miranda* warnings and the subsequent waiver by petitioner were consistent with *Miranda*. Consequently, there was no error in counsel's failure to object to the admission of the statements made to Officer Fiske.

B. Failure to Seek Jury Instructions or Modifications

Petitioner claims that counsel's failure to seek jury instructions or modifications as alleged in his third claim for relief amounted to ineffective assistance of counsel. With respect to the voluntary manslaughter instruction, this court has found the evidence of provocation insufficient to cause a rational jury to return a conviction for voluntary manslaughter. Therefore, counsel's failure to request such an instruction was not unreasonable.

Petitioner also claims ineffective assistance of counsel with respect to the failure to request an instruction on voluntary intoxication. California Penal Code § 22(b) provides that "[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought." In California, a criminal defendant is entitled to an instruction on voluntary intoxication only when he provides evidence of the amount of intoxicating substances in his system at the time of the crime. *People v. Carr*, 8 Cal. 3d 287, 295 (1972). Further, a criminal defendant must show actual intoxication at the time of the crime to an extent that would suggest that the defendant

lacked the specific intent or mental state required to commit the crime. *People v. Horton*, 11 Cal. 4th 1068, 1119 (1995). Even though a drug abuse screen was performed on the petitioner the day after the killing and the test showed the presence of benzoylecgonine, THC metabolites, amphetamine, and methamphetamine, petitioner did not provide sufficient evidence to establish the amount of these intoxicants in his system or the intoxicating effect they had upon him. In addition, Officer Fiske testified that he had known petitioner for at least five years prior to the crime and that petitioner did not appear intoxicated when he interviewed petitioner for an hour on the night of the crime. (RT 350, 356-57.) In the absence of sufficient evidence of intoxication to entitle petitioner to a voluntary intoxication instruction, petitioner's counsel did not err in failing to request the instruction.

Further, it does not appear that any failure to pursue a defense based on voluntary intoxication prejudiced petitioner. The voluntary intoxication defense may be ruled out by strong evidence of specific intent. *Horton*, 11 Cal. 4th at 1119. In *Horton*, "the circumstantial evidence indicated that the crimes were carried out in accordance with a predesigned plan . . . . [T]he statements made by defendant following the murder and robbery helped support a finding that defendant was fully aware of his actions and intended their fatal consequences." *Id.* The facts of this case lead to the same conclusion. The court has found that the evidence was sufficient to allow a reasonable jury to find first degree murder while lying in wait beyond a reasonable doubt. Therefore, the court finds no reasonable probability that a voluntary intoxication instruction would have changed the result of the trial. Accordingly, petitioner's counsel was not ineffective with respect to a voluntary intoxication instruction.

C. Failure to Request Additional Peremptory Challenges

The court has found that the trial court's denial of half of petitioner's peremptory challenges violated due process. Under ineffective assistance of counsel analysis, however, petitioner must make a higher showing of prejudice. Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Petitioner has not demonstrated a reasonable probability that the result of his trial would have been any different had counsel requested and exercised the ten additional peremptory challenges. Accordingly, the court is unable to find that petitioner received ineffective assistance of counsel as a result of counsel's failure to request additional peremptory challenges.

D. Failure to Present a Mens Rea Defense

Petitioner claims that trial counsel was ineffective because he chose not to present a mens rea defense based on petitioner's history of mental problems. Petitioner points to four instances in which he was hospitalized due to mental problems.

In challenging the effectiveness of counsel under the Sixth Amendment, "[p]etitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. In a sworn declaration, petitioner's trial counsel declares that he "did not feel it appropriate or viable to present a psychiatric or Mens Reas [sic] Defense in this case." (Resps.' Ans., Ex. D at 1.) Further, petitioner's trial counsel declared that he had investigated petitioner's history of mental problems and dismissed them as an issue after learning that petitioner's

licensed clinical social worker believed petitioner was malingering in an attempt to reduce his jail sentence. (Resps.' Ans., Ex. C at 2.) Inconsistencies between petitioner's alleged mental disorder and the stories he told treating physicians led them to believe that he was "confabulating." (Pet'r's Traverse, Ex. A.) In addition, observations that petitioner showed little change when his medication was increased led the treating physician to suspect that petitioner was malingering. (*Id.*)

Given the inconclusiveness of petitioner's mental health history and the potentially damaging information that he might have been malingering, this court finds that it was not unreasonable for petitioner's counsel to choose not to raise the issue. Counsel's decision not to raise the issue under the circumstances of this case did not comprise assistance of counsel that fell below an objective standard of reasonableness.

Further, counsel's decision not to pursue the mens rea defense did not prejudice petitioner. The California legislature abolished diminished capacity as a defense in 1981. *Horton*, 11 Cal. 4th at 1118. As a result, mental illness is "admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." *People v. Saille*, 54 Cal. 3d 1103, 1112 (1991). In the instant case, there was sufficient evidence to support a finding of specific intent. The court has found that a rational jury could find first degree murder while lying in wait beyond a reasonable doubt. Further, petitioner's incriminating remarks and his letter to his brother show that he was "fully aware of his actions and intended their fatal consequences." *Horton*, 11 Cal. 4th at 1119. Accordingly, petitioner has not demonstrated a reasonable probability that amens rea defense based on mental illness would have changed the outcome of the trial.

With respect to the issues petitioner has raised, this court finds that trial counsel exercised competent, professional judgment in the significant decisions relating to petitioner's trial. Petitioner has not established a reasonable probability that, but for the alleged errors, petitioner would have prevailed at trial. Thus, the court finds that petitioner was not denied effective assistance of counsel.

VI. Ground Seven: Lack of Competence to Stand Trial

Petitioner claims that he was not competent to stand trial due to "mental deficits." As a result of these deficits, he claims that he could not understand the proceedings before and during trial and could not assist counsel in his defense. Petitioner alleges that the court's failure sua sponte to conduct a competency hearing violated his right to due process and his counsel's failure to request such a hearing violated his right to effective assistance of counsel.

An individual may not be tried for a criminal offense unless he is competent. *Godinez v. Moran*, 509 U.S. 389, 396 (1993); *Pate v. Robinson*, 383 U.S. 375, 378 (1966). A defendant is competent to stand trial if he "has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Godinez*, 509 U.S. at 396 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)).

A. Trial Court's Failure to Conduct a Competency Hearing Sua Sponte

In a federal habeas corpus proceeding, a court reviewing a record for evidence of a defendant's competence in a state court proceeding must determine

"whether evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence." *United States v. Lewis*, 991 F.2d 524, 527 (9th Cir.), *cert. denied* 510 U.S. 878 (1993) (quoting *Chavez v. United States*, 656 F.2d 512, 516 (9th Cir. 1981)).

Due process requires the trial court to conduct a competency hearing sua sponte if substantial evidence creates a good faith doubt concerning the defendant's competency. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 510 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1378 (1995). "There are no particular facts which invariably signal incompetence, but important factors which merit a judge's attention include: irrational behavior, demeanor before the trial court, and available medical evaluations." *United States v. Lewis*, 991 F.2d at 527 (citing *Drope v. Missouri*, 420 U.S. 162, 180 (1975)). Due process does not require a competency hearing unless the facts present a "substantial" or "bona fide" doubt as to the defendant's competency. *Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir. 1991). Psychiatric testimony standing alone need not create the requisite doubt. *Id.* at 718.

In the instant case, petitioner points to the following facts in support of his argument that the trial court should have doubted his competency to stand trial: irrational and violent behavior in jail, irrational behavior in confessing his guilt to jail guards and to Ruspoli, and an outburst during sentencing. With regard to the irrational and violent behavior in jail, petitioner does not allege specific facts of the incidents, nor does he provide any explanation as to why violent behavior should cause the trial court to be concerned about petitioner's competence. Further, although petitioner argues that it was irrational to confess his crimes, confessions are not uncommon. There are many inferences a court can draw from a confession, including the inference that the confession resulted from feelings of guilt or remorse. Petitioner has

shown no reason why the trial court should have viewed his confessions differently from other confessions.

Finally, petitioner argues that his outburst during sentencing should have caused the court concern. (Pet'r's Traverse at 21.) The outburst occurred as the prosecutor was arguing the strength of the evidence at trial that the murder was premeditated:

> [PETITIONER]: I didn't fuckin' kill him, though, that's the fuckin' problem that you mother fuckin' --
>
> THE COURT: Sir, if you're not quiet I'm going to have you removed from the courtroom.
>
> [PETITIONER]: I don't give a fuck. You're taking my fuckin' life, man.
>
> THE COURT: You can be returned to the courtroom when you can comport yourself.
>
> [PETITIONER]: Fuckin' can't even (inaudible).
>
> THE COURT: Just take him to the back, just take him to the back. Let the record indicate that the Defendant has been disruptive, he's been noisy . . . .

(RT 586-87.) In light of the fact that the outburst occurred at sentencing, where petitioner was to receive a sentence of life imprisonment without parole, this court finds that the outburst would not have given the trial court a cause for reasonable concern as to petitioner's competence to stand trial. Moreover, petitioner's statement that the judge was "taking [his] . . . life" supports an inference that petitioner had a rational as well as factual understanding of the proceedings against him.

Finally, petitioner's counsel did not request a competency hearing. The Ninth Circuit has recognized that a criminal defendant's counsel is in the best position to determine whether the defendant can comprehend the proceedings. *Hernandez*, 930 F.2d at 718. "If [a criminal defendant] had been unable to effectively assist counsel,

it logically follows that his attorney would have been the first to know." *United States v. Clark*, 617 F.2d 180, 186 n.11 (9th Cir. 1980). It is significant evidence of competence when a criminal defendant's own attorney considers him competent. *Id.*

For all of these reasons, this court finds that the trial court did not have a basis for concern about petitioner's competency and therefore did not violate petitioner's right to due process by failing to conduct a competency hearing sua sponte.

B. Counsel's Failure to Request a Competency Hearing

Petitioner claims that his mental problems made him unable to understand the proceedings against him or to assist his counsel in his defense. As a result, he asserts that his trial counsel was ineffective for failing to request a hearing to determine whether he was competent.

Petitioner's counsel declares that petitioner appeared to be able to understand the proceedings. (Resps.' Ans., Ex. C at 3.) Petitioner discussed the course of the trial with counsel and was able to disclose names of potential defense witnesses. (*Id.*) Even though petitioner's counsel investigated and learned of petitioner's medical history, counsel did not doubt petitioner's competency to stand trial. (*Id.*) Absent a showing by petitioner that he was unable to understand the proceedings and assist in his defense, the declaration of petitioner's counsel leads this court to find that petitioner's counsel did not violate petitioner's right to effective assistance of counsel by failing to request a competency hearing.

VII. Ground Eight: Cumulative Effect of Errors

Petitioner contends that, even if none of the alleged errors was prejudicial by itself, the cumulative impact of any or all of the errors was prejudicial. Other than this conclusory assertion, petitioner offers no specific factual analysis.

"[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Indeed, "there can be no such thing as an error-free, perfect trial." *United States v. Hasting*, 461 U.S. 499, 508-09 (1983). However, "prejudice may result from the cumulative impact of multiple deficiencies." *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979). While individual errors looked at separately may not rise to the level of constitutional error, the cumulative effect of such errors may so prejudice the defendant's right to a fair trial that reversal is warranted. *United States v. Berry*, 627 F.2d 193,200-01 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). *See also United States v. Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983); *Strickland v. Washington*, 466 U.S. 668, 696 (1984) (ultimate focus of inquiry must be on the fundamental fairness of the proceeding). In assessing alleged cumulative effect of errors, the court should not consider actions held not to be error. *Berry*, 627 F.2d at 201.

This court has held that the trial court's denial of half of petitioner's peremptory challenges during voir dire and denial of petitioner's motion for a new trial on that basis constituted reversible error. As to petitioner's other claims, the court has found no constitutional error. Petitioner has failed to show that he suffered any prejudice to his right to a fair trial as a result of the cumulative effect of errors.

Upon careful consideration of the record, this court finds that the trial court deprived petitioner of a fair

and reliable trial by improperly denying him the full number of peremptory challenges during voir dire to which he was entitled under California law and by denying petitioner a new trial on that ground. Based upon the error established in petitioner's fifth claim, this court will recommend that the petition for a writ of habeas corpus be granted.

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus be granted; and

2. A writ of habeas corpus be issued commanding the State of California to vacate and set aside petitioner's convictions in the case of *People v. VanSickel*, case number 5405 of the Superior Court of the County of Tehama, unless, within sixty days of the entry of judgment herein, the State of California grants petitioner a new trial.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to

appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 19, 1997.

_____
UNITED STATES MAGISTRATE JUDGE

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APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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MICHAEL EDWARD VANSICKEL,	)	NO. CIV. S-95-1355 WBS\JFM
Petitioner,	)	
v.	)	ORDER
THEO WHITE, et al.,	)	
Respondents.	)	

----oo0oo----

Petitioner has filed a petition for writ of habeas corpus challenging his conviction for first degree murder. 28 U.S.C. § 2254. He is currently under sentence of life imprisonment without the possibility of parole. Pursuant to 28 U.S.C. § 636 and Local Rule 72-302(c)(17), on May 19, 1997 Magistrate Judge Moulds issued findings and recommendations recommending that the petition be granted and that the court issue a writ of habeas corpus commanding the State of California to vacate and set aside petitioner's conviction unless the State grants him a new trial within sixty days of the entry of judgment herein. Respondents timely filed objections to the findings and recommendations, petitioner replied in opposition, and the court heard oral argument on the matter on July 14, 1997.

For the reasons stated below, the court agrees with and adopts all of the Magistrate Judge's findings and recommendations with two exceptions. The court

disagrees with the Magistrate Judge's findings (1) that petitioner's claim based upon improper denial of peremptory challenges is not procedurally barred and (2) that the failure to object constituted inadequate performance by trial counsel. Because the procedural default claim is the sole basis on which the Magistrate Judge recommends granting of the writ, issuance of a writ is not proper, and petitioner's application will therefore be denied.

STANDARD OF REVIEW

The court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1); *Karis v. Vasquez*, 828 F. Supp. 1449, 1455 (E.D. Cal. 1993) (citation omitted). All of the Magistrate Judge's conclusions of law are reviewed de novo. *Karis*, 828 F. Supp. at 1455 (citations omitted). The court may accept, reject, or modify, in whole or in part, the magistrate judge's findings or recommendations. 28 U.S.C. § 636(b)(1).

In reviewing the Magistrate Judge's findings and recommendations, the court has not applied the provisions of the Antiterrorism and Effective Death Penalty Act. *See Lindh v. Murphy*, -- S. Ct. --, 1997 WL 338568 (June 23, 1997)(holding that the Act's amendments to 28 U.S.C. § 2254(d) are inapplicable to cases pending at the time of their enactment).

DISCUSSION

The facts, procedural background, and issues presented in this matter are adequately set forth in the findings and recommendations. The court finds no need to restate them here. The only issue the court must discuss is whether the failure to object at trial to the

number of permitted peremptory challenges bars petitioner from raising the claim in his habeas application.

Federal courts generally will not consider a habeas claim if the last reasoned state court opinion denied the claim on independent and adequate state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2567, 115 L. Ed. 2d 640 (1991); *see also Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (federal court must look to the last reasoned state court opinion to determine if grounds are independent and adequate). In this case, the state appellate court issued the last reasoned opinion and held that the trial court properly denied petitioner's motion for a new trial because he did not make a timely objection to the number of peremptory challenges allowed.

Petitioner argues that the state appellate court opinion did not rely on an independent and adequate state law ground; it merely held that the failure to make a contemporaneous objection established a higher standard of review by requiring an additional finding of prejudice. This argument is unpersuasive, however, because the only reason the appellate court denied petitioner's claim was because he failed to follow trial procedures. The appellate court determined that he could not show prejudice, and for that reason alone denied his claim.

While petitioner is correct that the effect of the procedural error was to establish a more difficult standard of review, it is precisely that result which creates the procedural bar. Absent the addition of the prejudice requirement, per se reversal would be the rule and the failure to object would have no effect at all. *Compare People v. Yates*, 34 Cal. 3d 644, 654 (1983)(absent procedural error, the denial of the permitted number of peremptory challenges would have resulted in per se reversal) *with People v. Caro*, 45 Cal. 3d 1035, 1046-47 (1988) (where counsel failed to object, the conviction

could not be reversed unless defendant shows prejudice). Petitioner's argument is therefore meritless. As the Magistrate Judge correctly noted, however, the court's inquiry does not end merely because the state court relied upon an independent and adequate state law ground for denying the petitioner's claim.

A federal habeas petitioner who has failed to comply with a state law contemporaneous objection rule at trial may still obtain federal habeas review if he can show cause for the procedural default and actual prejudice attributable thereto (the "cause-and-prejudice" test). *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506, 53 L. Ed. 2d 594 (1977). To demonstrate cause, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986). A petitioner may also establish cause through proof of "constitutionally ineffective assistance of counsel," but attorney error short of ineffective assistance of counsel, however, "does not constitute cause and will not excuse a procedural default." *Id.* at 486-87; *Coleman*, 501 U.S. 722 (attorney error will constitute cause only if it amounts to "an independent constitutional violation").

If a petitioner can establish cause, he must then show actual prejudice resulting from the alleged error. *Bonin v. Calderon*, 77 F.3d 1155, 1158 (9th Cir. 1996) (citation omitted). If he cannot establish cause and prejudice, the court may still consider the merits of the claim "if failure to do so would result in a miscarriage of justice." *Id.* A miscarriage of justice occurs where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* (quoting *Schlup v. Delo*, -- U.S. ---, 115 S. Ct. 851, 863-64, 130 L. Ed. 2d 808 (1995)).

The Magistrate Judge relied upon the Ninth Circuit's definition of "cause" as set forth in *Hines v.*

Enomoto, 658 F.2d 667, 673-74 (9th Cir. 1981). In that case, the Ninth Circuit applied the *Sykes* cause-and-prejudice test where the petitioner's trial counsel failed to object to the denial of peremptory challenges. At the time of the *Hines* decision, the Supreme Court had identified but not explicitly defined the terms of the cause-and-prejudice standard. *See Sykes*, 433 U.S. at 87, 90-91, 97 S. Ct. at 2506, 2508 (leaving open for a future case the precise definitions of the terms). The Ninth Circuit therefore referred to its own standard for "cause" as previously stated in dicta in *Garrison v. McCarthy*, 653 F.2d 374, 377-78 (9th Cir. 1981). That decision indicated that where the failure to object is because of attorney ignorance or inadvertence, a defendant may establish cause "with proof short of that necessary to make out a Sixth Amendment claim [for ineffective assistance of counsel]." 653 F.2d at 378.[1]

In 1986, however, the Supreme Court decided *Carrier* in which it defined "cause" as either (1) error amounting to ineffective assistance of counsel, (2) some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court, or (3) proof of actual innocence (this last alternative also satisfies the prejudice prong). 477 U.S. at 486-87, 496. The Supreme court has explicitly stated that the *Carrier* test is to be applied broadly to all contemporaneous objection cases, regardless of the type of error or its timing. *Carrier*, 477 U.S. at 488 ("the question of cause for a procedural default does not turn on whether counsel erred or on the

---

1. The Ninth Circuit has only applied the *Garrison/Hines* cause standard once, in *Gibson v. Spalding*, 665 F.2d 863, 866 (9th Cir. 1981). That opinion was vacated by the Supreme Court, however, with instructions to reconsider in light of two Court opinions discussing the cause-and-prejudice standard. *See* 456 U.S. 968, 102 S. Ct. 2229 (1983). The Ninth Circuit ultimately remanded the matter to the district court to determine whether petitioner had exhausted his claims in state court. *See* 703 F.2d 362 (9th Cir. 1983).

kind of error counsel may have made"); *Coleman* ("[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default") (citations and quotations omitted).

Since the *Carrier* cause standard is a rule of general application, it governs instances where, as here, the petitioner failed to make a timely objection to an improper limitation on the number of peremptory challenges. The first part of the *Carrier* test thus conflicts with and supersedes the *Garrison/Hines* cause standard. Because Magistrate Moulds relied on the *Garrison/Hines* cause standard to conclude that petitioner's claim is not procedurally barred, his finding on that claim is in error.

Applying the *Carrier* test to this case, petitioner's attorney's failure to object at trial does not establish cause since, as the Magistrate Judge correctly concluded, the error does not rise to the level of a constitutional violation. Petitioner argues that the failure to object violated his Sixth Amendment right to competent counsel. To establish a claim of ineffective assistance of counsel, petitioner bears the burden of showing that counsel's conduct (1) fell below a standard or professional reasonableness; and (2) prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, petitioner has not met his burden of showing deficient performance by trial counsel. The right to exercise peremptory challenges is a creation of state statutory law, not a constitutional entitlement. *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988). Though failure to exercise peremptories may in some instances implicate the right to an impartial jury, in this case it did not. *See McClearn v. County of Sonoma*, No. C-93-0646 EFL, 1994 WL 443718 (N.D. Cal. Aug. 2, 1994) (counsel's failure to exercise peremptory challenges

is not unreasonable). There is no evidence that counsel allowed incompetent or biased jurors to sit on the jury; counsel's conduct thus did not deprive petitioner of a fair trial. *See Smith v. Phillips*, 455 U.S. 209 (1982) (absent evidence to the contrary, there is a strong presumption of juror competence and impartiality). The court therefore rejects the Magistrate Judge's finding that counsel's failure to object fell below the standard of professional competence.

Even if counsel's conduct was deficient, petitioner has failed to show prejudice. *See Strickland*, 466 U.S. at 693-95. To establish prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Counsel's errors must be "so serious as to deprive the defendant of a fair trial. . . ." *Id.* at 687.

There is no basis upon which to infer that the result of petitioner's trial would have been any different had he been allowed to use additional peremptories to select the two prospective jurors he preferred. The inculpatory evidence was so strong that the court cannot infer that substituting those two jurors would have made any difference in the outcome. *See Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995) (no prejudice shown where evidence was so overwhelming that additional evidence would not have changed the outcome). Furthermore, the denial of peremptories did not give the prosecution an advantage because the court denied the additional peremptories to both sides. Petitioner thus received a competent defense and fair trial notwithstanding counsel's error.

Petitioner argues in the alternative that cause nonetheless exists because the prosecutor's silence in the face of the obviously improper denial of peremptory challenges constituted an "objective factor external to the defense [that] impeded counsel's efforts to comply with

the procedural rule." *Carrier*, 477 U.S. at 488. This argument fails to persuade the court because the evidence does not establish that the prosecutor knew that an error had occurred. His silence more likely resulted from his own genuine belief that petitioner was only entitled to 10 peremptory challenges. Even if the prosecutor was aware of the error, his silence did not prevent counsel from discovering the governing law or voicing an objection.

Since a finding of no cause precludes review of petitioner's claim, the court need not reach the issue of whether the *Hines* "prejudice" standard applied by the Magistrate Judge remains viable in light of *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 476 (1982). *See English v. United States*, 42 F.3d 473, 480-81 (9th Cir. 1994) (noting that *Frady* applies to 28 U.S.C. § 2254 claims where defendant failed to raise contemporaneous objection at trial); *see also United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

As to all of the respondents' remaining objections, the court has conducted a de novo review and finds that the Magistrate Judge's findings and recommendations are supported by the record and proper analysis. With the exceptions discussed above, the court adopts the Magistrate Judge's findings and recommendations.

IT IS THEREFORE ORDERED that petitioner's petition for writ of habeas corpus be, and the same hereby is, DENIED.

DATED:

_____

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX E

California Code of Civil Procedure, § 231:

(a) In criminal cases, if the offense charged is punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 20 and the people to 20 peremptory challenges. Except as provided in subdivision (b), in a trial for any other offense, the defendant is entitled to 10 and the state to 10 peremptory challenges. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to five additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

(b) If the offense charged is punishable with a maximum term of imprisonment of 90 days or less, the defendant is entitled to six and the state to six peremptory challenges. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to four additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

(c) In civil cases, each party shall be entitled to six peremptory challenges. If there are more than two parties, the court shall, for the purpose of allotting peremptory challenges, divide the parties into two or more sides according to their respective interests in the issues. Each side shall be entitled to eight peremptory challenges. If there are several parties on a side, the court shall divide the challenges among them as nearly equally as possible. If there are more than two sides, the court shall grant such additional peremptory challenges to a side as the

interests of justice may require; provided that the peremptory challenges of one side shall not exceed the aggregate number of peremptory challenges of all other sides. If any party on a side does not use his or her full share of peremptory challenges, the unused challenges may be used by the other party or parties on the same side.

(d) Peremptory challenges shall be taken or passed by the sides alternately, commencing with the plaintiff or people; and each party shall be entitled to have the panel full before exercising any peremptory challenge. When each side passes consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

(e) If all the parties on both sides pass consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United

States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.